(2)

No. 98-262

In The

Supreme Court of the United States

October Term, 1998

PERRY JOHNSON, et al.,

Petitioners,

v.

EVERETT HADIX, et al.,

Respondents.

PERRY JOHNSON, et al.,

Petitioners,

v.

MARY GLOVER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the attorney fee provisions of the Prison Litigation Reform Act, 42 U.S.C § 1997e(d), apply retroactively to cases pending on the date of enactment.

PARTIES TO THE PROCEEDING

Respondents do not dispute Petitioners' designation of parties.

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JURISDICTION

Respondents do not dispute this Court's jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Petition concerns two class actions involving prisoners under the jurisdiction of the Michigan Department of Corrections ("MDOC"). These cases were consolidated to address the applicability of the Prison Litigation Reform Act's ("PLRA" or "Act") 42 U.S.C. §1997e(d), attorney fee provisions to services performed both prior to and subsequent to the passage of the Act. *Hadix, et al. v. Johnson, et al.; Glover, et al. v. Johnson, et al.*, 143 F.3d 246 (6th Cir. 1998) (*"Hadix/Glover"*).

Both *Hadix* and *Glover* are pending cases in which the following acts occurred prior to the passage of the PLRA. 1) Judgments were entered placing the cases in a post-judgment remedial stage; 2) Plaintiffs were awarded fees as prevailing parties; 3) Court orders were entered establishing Plaintiffs' entitlement to attorney fees at a prevailing market rate; 4) The parties stipulated to orders entitling Plaintiffs to all reasonable post-judgment monitoring fees; and 5) Orders were entered establishing specific market rates to be paid for post-judgment monitoring.

The unique history and proceedings of the two cases are detailed below.

A. *Glover v. Johnson*

The procedural history of the *Glover* case is set forth in *Glover v. Johnson*, 931 F. Supp. 1360, 1362-1363 (E.D. Mich. 1996) and is not repeated here except as it relates to the instant appeal.

In 1977, Respondents (hereinafter "Plaintiffs") filed an action seeking a declaratory judgment for violation of their Equal Protection rights and their right to access to the courts. After a bench trial, the district court ruled that Petitioners (hereinafter "Defendants") had violated the Equal Protection Clause of the Fourteenth Amendment and failed to provide meaningful access to the courts to the Plaintiff class. A "final order" was subsequently entered detailing the steps Defendants were to take to remedy the found violations. *Glover v. Johnson*, 510 F. Supp. 1019, 1023 (E.D. Mich. 1981). Plaintiffs were thereafter found to be prevailing parties and awarded attorney fees pursuant to 42 U.S.C. §1980.

On November 12, 1985, the parties entered into a stipulated order entitling Plaintiffs to attorney fees for post-judgment monitoring of the court's decree and establishing a procedure for the submission of the attorney fees and costs.[1] Thereafter, Plaintiffs submitted petitions for attorney fees on a semiannual basis with the district court resolving any disputes as to the reasonableness of the fees or the appropriate market rate.

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[1] Current attorneys for the Plaintiffs entered their appearances in this case after entry of this order entitling Plaintiffs to compensation, at the prevailing market rate, for their post-judgment monitoring.

Throughout the 1980's, Defendants failure to obey the court's orders resulted in extensive findings of contempt and an order for Defendants to submit a remedial plan to cure the found Constitutional violations. *Glover v. Johnson*, 721 F. Supp. 808 (E.D. Mich. 1989), *aff'd*, 934 F.2d 703 (6th Cir. 1991). The Sixth Circuit also affirmed Plaintiffs' ongoing entitlement to attorney fees at the prevailing market rate for post-judgment monitoring. *Glover v. Johnson*, 934 F.2d at 715-716.

After remand, Defendants submitted a remedial plan to cure their contempt. In the course of monitoring Defendants' compliance, Plaintiffs submitted a petition for fees for the six month period of July 1, 1995 through December 31, 1995. Defendants submitted objections and while Plaintiffs' motion for settlement was pending, the Prison Litigation Reform Act of 1995 was signed into law. Defendants asserted that the Act applied to attorney fees for services performed prior to the passage of the Act and awarded after passage of the Act. The district court ruled that the PLRA did not apply to an award of attorney fees for legal services completed prior to the enactment of the PLRA which opinion was affirmed by the circuit court. *Glover v. Johnson*, 138 F.3d 229, 249 (6th Cir. 1998). Defendants sought no review of this opinion.[2]

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[2] At this time Defendants request to terminate the litigation was denied based on a finding that Defendants had not demonstrated substantial compliance. *Glover v. Johnson*, 879 F. Supp. 752 (E.D. Mich. 1995), *aff'd*, *Glover v. Johnson*, 138 F.3d 229 (6th Cir. 1998) (remanding for hearings on the current status of parity between male and female prisoners in Michigan). In 1996, the district court again found Defendants in contempt of numerous court orders and issued sanctions. *Glover v. Johnson*,

Thereafter, Plaintiffs submitted a petition for the time period of January 1, 1996 through June 30, 1996. Ruling on Defendants' assertion that the Act should apply to hours worked both prior to and subsequent to the Act's passage, the district court reiterated its prior ruling that the PLRA's attorneys' fee provisions do not apply to pre-enactment services but applied the Act to services performed after its enactment. The Sixth Circuit in a consolidated appeal with a nearly identical opinion in *Hadix*, reversed and held that the fee limitations of the Act do not apply to these pending cases. *Hadix v. Johnson*, 143 F.3d 246 (6th Cir. 1998).

B. *Hadix v. Johnson*

This class action was filed in 1980 by male prisoners incarcerated in the Central Complex of the State Prison of Southern Michigan, asserting that the condition of their confinement violated their First, Eighth and Fourteenth Amendment rights.[3]

Five years later, the parties entered into a comprehensive consent decree designed to "assure the constitutionality of the conditions under which prisoners are incarcerated." The consent judgment addressed, *inter alia*, sanitation, safety, mental health, health care, medical, fire safety, overcrowding and protection from harm, access to

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931 F. Supp. 1360 (E.D. Mich. 1996), *aff'd* in part and *rev'd* in part, *Glover v. Johnson*, 138 F.3d 229 (6th Cir. 1998).

[3] Built in 1926, this facility is still considered to be the largest walled prison in the world with over 57 ½ acres inside the Central Complex.

courts, food service, management, and mail. The consent degree further provided for the development and implementation of a "break-up" plan to alleviate constitutional violations in the central complex. *Hadix v. Johnson*, 144 F.3d 925 (6th Cir. 1998).

On November 19, 1987 the district court entered an order establishing Plaintiffs' entitlement to attorney fees for all reasonable post-judgment monitoring. Thereafter, Plaintiffs submitted and were compensated for fees at the prevailing market rate on a biannual basis. A specific market rate was established by the district court in 1991 and affirmed by the circuit court. *Hadix v. Johnson*, 65 F.3d 532 (6th Cir. 1995).

While the process established to complete the requirements of the Consent Judgment and bring finality to the case was proceeding, the PLRA became effective on April 26, 1996. Defendants moved for immediate termination of the consent decree and challenged Plaintiffs' entitlement to continued attorney fees asserting the PLRA's fee provisions applied to limit both pre- and post-enactment services.[4]

In proceedings which parallel the events in *Glover*, the district court held that the PLRA's fee provision did not apply to services performed prior to its enactment which ruling was affirmed by the Sixth Circuit. *Hadix v.*

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[4] The district court denied Defendants' motion to terminate finding the PLRA's termination provision unconstitutional. *Hadix v. Johnson*, 947 F. Supp. 1100 (E.D. Mich. 1996). The Sixth Circuit reversed and remanded the case for hearings to make findings regarding current and ongoing violations of Plaintiffs' Federal rights. *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998).

Johnson, 144 F.3d 925, 946 (6th Cir. 1998). Defendants sought no review of this decision.

Thereafter, Defendants challenged Plaintiffs' entitlement to post-enactment fees. The district court ruled that the application of the PLRA's fee provisions to post-enactment services would not constitute a retroactive application of the statute which holding was reversed by the Sixth Circuit in a consolidated opinion. *Hadix/Glover*, 143 F.3d 246 (6th Cir. 1998). Defendants now seek a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. THE CIRCUIT COURT CORRECTLY HELD THAT SECTION 803(d) OF THE PLRA DOES NOT APPLY TO LIMIT ENTITLEMENT TO ATTORNEY FEES IN CASES PENDING ON THE DATE OF ITS ENACTMENT.

The statute at issue states:

(d) **Attorney's fees**

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that

(A) the fee was directly and reasonably incurred in proving an actual violation of the Plaintiffs' rights protected by a statute pursuant to which fees may be awarded under section 2 of the Revised Statute; and

(B)(i) the amount of the fee is proportionally related to the court ordered relief for the violation; or (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

* * *

(3) No award of attorney fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under Section 3006A of Title 18, United States Code, for payment of court appointed counsel.

A. The Statutory Language Of The PLRA's Fee Provisions Do Not Clearly And Unambiguously Indicate Congressional Intent To Apply Its Limitations To Pending Cases.

The first question to be asked in determining whether a statute applies to pending cases is whether Congress has expressly resolved, by clearly stating in unambiguous language, that the statutory provisions at issue apply to pending cases. *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). This Court recently emphasized its ruling in *Landgraf* that in order to apply a statute retroactively there must be an 'extraordinarily clear statement of Congressional intent' for retroactive application. *Lindh v. Murphy*, 117 S.Ct. 2059 (1997).[5]

[5] Demonstrating the rigor with which this Court enforces its 'clear statement' rule, *Lindh* gave as an example of *possible* unambiguous intent the following language: "This Act shall apply to all proceedings pending on or commenced after the date of the enactment of the Act." *Lindh, supra* at 2064 n. 4, *citing Landgraf v. USI Film Products*, 511 U.S. 244, 260 (1994).

The statutory language at issue in *Lindh*, requiring that "an application for writ of habeas corpus shall not be granted," except as otherwise provided, was found not sufficiently clear to overcome the longstanding presumption against retroactive legislation. The language at issue in §803 of the PLRA parallels the language at issue in *Lindh*, requiring that: "fees shall not be awarded" except as otherwise provided, and similarly fails to meet the stringent requirement of an expression of Congressional intent to apply the Act to pending cases. *Hadix/Glover*, Apx. at 10a (referencing the circuit court's prior opinion in *Glover v. Johnson*, 138 F.3d 229, 249 (6th Cir. 1998)).[6]

Absent unequivocal language prescribing the temporal reach of the statute and in the face of clear retroactivity language in another section of this statute, the Sixth Circuit correctly ruled that the PLRA's fee provisions, set forth in §803(d), are inapplicable to fee petitions for work performed both prior to and after the PLRA's enactment date.[7]

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[6] The vast majority of district courts and the Second, Sixth,, Seventh and Eighth Circuits have held that the statute's language does not evince a sufficiently clear intent to apply the fee limitations of the PLRA to pending cases. *Blissett v. Casey*,, 147 F.3d 218 (2nd Cir. 1998); *Hadix v. Johnson*, 144 F.3d 925 (6th Cir. 1998); *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996); *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996). The existence of these cases refute the Defendants' assertion that the statute so clearly applies to pending cases that "the text is simply not susceptible to another meaning." Defendants' Petition at p. 10 relying on *Madrid v. Gomez*, 150 F.3d 1030 (9th Cir. 1998), *reh'g pet. filed*.

[7] The Sixth Circuit correctly rejected the distinction between pre- and post-enactment fees under the PLRA as such a distinction would require an interpretation of the same

B. Absent Clear Evidence Of Legislative Intent To Apply The Statute Retroactively, Application Of The Canons Of Statutory Interpretation Mandate That The PLRA Fee Provisions Not Be Applied To Pending Cases.

In *Lindh*, this Court was asked to decide whether certain provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), which amended the federal habeas statute, applied to an application for habeas pending at the time the new statute was enacted.[8] The court held that because one Section of the AEDPA explicitly applied to pending cases and the other relevant section did not, this evidenced clear congressional intent that the latter section would *not* apply to pending cases. *Lindh v. Murphy*, 117 S.Ct. at 2063.

Application of this statutory analysis to the PLRA requires the same conclusion. The attorney fee provisions of the PLRA, amending 42 U.S.C. §1997e are found in §803 of the Act. This section is silent as to whether it

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statutory language to convey Congressional intent to apply §803 to pending cases for post-enactment fees but not apply it to pending cases for pre-enactment fees. Accordingly, the court stated: "We do not believe the statutory language is capable of such a sophisticated construction; either the fee provision applies to pending cases or not." Apx. at 11a-12a.

[8] The AEDPA consists of two chapters, one of which governs capital cases and explicitly provides that it "shall apply to cases pending on or after the date of enactment of this act." The other chapter – the one at issue in *Lindh* – governs non-capital cases and provides only that "[a]n application for a writ of habeas corpus . . . shall not be granted" except as provided. 28 U.S.C. Section 2254(d). *Lindh, supra* at 2063-2065.

should be applied retroactively to pending cases or prospectively to cases filed after the Act's passage. In stark contrast, §802 of the Act, which addresses "appropriate remedies" in prison conditions litigation explicitly provides that the section is to be applied to pending cases stating:

> Section 3626 of Title 18 United States Code as amended by this Section shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.[9]

This Court held that the nearly identical difference between two sections of the AEDPA indicated Congress' intent that the latter provision should be applied only to cases filed after enactment of AEDPA. *Lindh*, 117 S.Ct. at 2063. This Court found this "negative implication" to be particularly pronounced because "the two chapters had already been joined together [in a single bill] and were being considered simultaneously when the language raising the implication was inserted," although they began

[9] The Sixth Circuit detailed the legislative history of the PLRA noting that as it made its way through the legislative process the two sections were originally joined together with the attorney fee and other remedy provisions PLRA appearing together in a single section subject to an explicit statement of applicability to all pending cases. Thereafter the attorney fees provision was extracted from this section and transferred to a new section of the bill (Section 803) which did not contain a retroactivity provision. The statute retained this structure until its final passage. *Hadix/Johnson*, Apx. at 14-16a.

life independently and in different houses of Congress. *Id.* at 2065.[10]

While noting distinctions between the PLRA and AEDPA the circuit court found that the "identical negative inference that was drawn in *Lindh* can be drawn when Sections 802 and 803 are compared."[11] The

[10] The *Lindh* Court thereafter ruled that where there is no risk of retroactive effect, the Court need not apply the judicial default rules traditionally employed in the second step of this Court's analysis in *Landgraf* stating: "Although *Landgraf's* default rule would deny application when a retroactive effect would otherwise result, other construction rules may apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case), as *Lindh* argues the recognition of a negative implication would do here. In sum, if the application of a term would be retroactive as to *Lindh*, the term will not be applied, even if, in the absence of retroactive effect, we might find the term inapplicable; if it would be prospective, the particular degree of prospectivity intended in the Act will be identified in the normal course in order to determine whether the term does apply to *Lindh*." *Lindh*, 117 S.Ct. at 2063.

[11] Defendants' attempt to provide an alternate explanation for explicit retroactivity language appearing in §802 and not in §803 is unpersuasive. Defendants speculate that Congressional awareness of ongoing cases involving prospective relief necessitated Congress making their intent to apply the provisions of §802 to pending cases absolutely clear. Defendants' Petition at p. 15. However, Defendants acknowledge that Congress was also aware and expressed their concern with the ongoing costs (which would include monitoring fees) associated with pending cases and Congressional awareness of the presumption against retroactivity and the need for clearly expressed intent must be presumed. Defendants' Petition at p. 21 n. 9. Similarly, Defendants' attempt to characterize one section of the statute as

Congressional removal of the attorney fees provisions from the section which explicitly provided for its application to pending cases, to a section which did not so provide, evinces Congressional intent that this provision is only to be applied prospectively, i.e., to prisoner cases brought after the effective date of the Act.

Where application of the canon of statutory interpretation, *expressio unius est esclusio alterius*, demonstrates Congressional intent that the statute is not to be applied to pending cases, the court need not proceed to decide whether such application would be manifestly unjust. While, the Sixth Circuit, relying upon *Lindh*, held that in light of the ambiquity of the statutory language and the application of the canons of statutory construction to the statute's legislative history, one need not resort to the application of "judicial default rules," to conclude that the Act does not apply to pending cases. Application of these rules to the present case would result in the same conclusion, for different reasons.

C. Application Of The PLRA's Fee Provisions To The Litigation At Issue Would Constitute An Impermissible Retroactive Application Of The Act Resulting In Manifest Injustice To The Plaintiffs.

The judicial default rules are guided by the presumption against retroactively applying laws to pending cases absent clear legislative intent:

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primary or substantive and another as procedural is not determinative with respect to this retroactivity analysis. *Lindh*, 117 S.Ct. at 2070, (Rehnquist, C.J., dissenting).

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to perform their conduct accordingly; settled expectations should not be lightly disrupted. *Id.* at 1497. (internal footnote omitted).

If Congressional intent regarding a statute's reach remains unclear, a court's next task is to determine whether application of the statute to a case based on events that occurred before the statute's passage would have a retroactive effect.

> [F]amiliar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance. *Id.* at 1499-1500.

In describing circumstances that constitute impermissible retroactive effect, this Court noted that:

> [E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retroactive. *Landgraf, supra* at 1505.[12]

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[12] This language does not purport to define the outer limit of impermissible retroactivity. This Court clarified that its opinion in *Landraf* "[M]erely described that any such effect constituted a sufficient, rather than a necessary, condition for invoking the presumption against retroactivity. Indeed, we recognized that the Court has used various formulations to describe the 'functional conception of legislative 'retroactivity,' and made no suggestion that Justice Story's formulation was the

Application of the PLRA's attorney fee provisions to these cases would deny Plaintiffs "fair notice" and have an impermissible retroactive effect that would result in manifest injustice to the Plaintiffs.

Plaintiffs counsel undertook this litigation with the settled expectation that they would be compensated for the hours that were reasonably spent litigating the case at the prevailing market rate for attorneys with similar experience and skill.[13] If the attorney fee provisions of the PLRA are applied to this case, Plaintiffs' counsel would be compensated well below market rates for hours reasonably spent in successfully litigating the case and insuring compliance with the orders of the court and the Constitution.

The reduction brought by the PLRA's restrictions would attach crippling new legal consequences to events completed before the PLRA's enactment – the assumption of this representation for these Plaintiffs at the expense of handling other litigation – and take away rights acquired under then-existing laws and preexisting court orders in this case.[14]

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exclusive definition of presumptively impermissible retroactive legislation." *Hughes Aircraft Co. v. United ex rel. Shumes*, 117 S.Ct. 1871, 1876 (1997).

[13] This "settled expectation" was based in part on judicial findings, that Plaintiffs' counsel were entitled to such fees. *Glover v. Johnson*, 934 F.2d 703 (6th Cir. 1991); *Hadix v. Johnson*, 65 F.3d 532 (6th Cir. 1995).

[14] As recognized by the court in *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996): "Nothing in this portion of the Act expressly prescribes its reach. The Act was not in effect when the plaintiffs' attorneys accepted this appointment, when

The relevant event for measuring expectations of attorney fees is not, as Defendants argue, the date counsel performed work but rather the date counsel agreed to take the case.[15] It is at that point in time that Plaintiffs evaluate the case and balance the likelihood of success with expectations of reimbursement at a reasonable rate should they prevail. It is at this time that Plaintiffs' counsel commit themselves ethically to continued representation of a class of prisoners to ensure that the Constitution is honored. Plaintiffs' counsel could not thereafter ethically discontinue their representation despite the potential financial hardship. *Mallard v. United States Dist.*

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liability and fee determinations were made [.] . . . When the plaintiffs' attorneys were exerting what the District Court quite fairly described as "herculean" efforts on their behalf, they expected to have their fee determined under Section 1988. If we apply the Act, those expectations will be foiled. Thus, application of the Act to this case would have the retroactive effect of disappointing reasonable reliance on prior law. That leaves us with the "traditional presumption" against retroactive application . . . It would be "manifestly unjust" to upset [plaintiffs'] reasonable expectations and impose new guidelines at this late date." *Id.* at 1202.

[15] The Ninth Circuit in *Madrid v. Gomez, supra* concurred in finding that the relevant date for measuring expectations is "the moment when counsel agreed to take the case." 150 F.3d at 1039. The court concludes, however, that expectations of recovery at that time are too uncertain; failing to recognize that it is the knowledge that compensation will be at a fair market rate, that allows an attorney to accept the uncertainty of prevailing in deciding to take a case. However the *Glover* case, where current counsel did not enter the case until after judgment and an order providing that Plaintiffs were entitled to all reasonable post-judgment monitoring fees at market rate was entered, expectations at the relevant moment were clearly settled.

Court for the Southern Dist. of Iowa, 490 U.S. 296, 316 (1989) (Stevens, J., Marshall, J., Blackmun, J., and O'Connor, J., dissenting) (citing *Ohntrup v. Firearms Center, Inc.*, 802 F.2d 676 (3rd Cir. 1986) and *Mekdeci ex rel. Mekdeci v. Merrell National Laboratories*, 711 F.2d 1510, 1521-22 (11th Cir. 1983)).

Given these considerations, and the fact that Plaintiffs did not have "fair notice" that attorney fees would no longer be based upon prevailing market rate but rather a radically lower rate, the provisions would have "retroactive effect" if applied to the present cases. To apply new fee restrictions without Plaintiffs' counsel having any real opportunity to alter their prior commitment to representation would be manifestly unjust.

II. ANY CONFLICT BETWEEN THE REASONING OF THE CIRCUITS ON THIS ISSUE HAS BEEN RESOLVED BY THIS COURT'S SUBSEQUENT OPINIONS

Defendants urge review of the Sixth Circuit's opinion to resolve a conflict among the circuits. The differences in the reasonings of the circuit opinions which have addressed the retroactive application of the PLRA's fee provisions do not warrant a grant of certiorari in this case.

Defendants argue that the Sixth Circuit's opinion stands alone in opposition to three circuit decisions holding that the PLRA's fee limitations apply to cases pending on the date of its enactment. Defendants' Petition pp. 8-9 referencing *Alexander S. v. Boyd*, 113 F.3d 1373 (4th Cir. 1997), *cert. denied*, 139 L. Ed. 2d 869 (1918); *Madrid v.*

Gomez, 150 F.3d 1030 (9th Cir. 1998), *reh'g pet. filed* and *Williams v. Brimeyer*, 122 F.3d 1093 (8th Cir. 1997).

Defendants however fail to advise this Court that the *Williams* holding, issued as a two-page order, was rejected by a subsequent decision of the Eighth Circuit holding that the PLRA's fee provisions do not apply to pending cases. *Weaver v. Clarke*, 120 F.3d 852 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 898 (1998) (relying upon *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996)). Defendants also fail to note that *Alexander S.* was decided prior to, and without the benefit of this Court's treatment of the retroactivity issue in *Lindh v. Murphy, supra*.

The only circuit decision which was decided after *Lindh* is the Ninth Circuit's opinion in *Madrid*. However as Plaintiffs have requested rehearing, asserting that the panel's holding in *Madrid* conflicts with the retroactivity analysis of a prior en banc decision of the circuit in *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997), and the court has ordered briefing on these issues, the final outcome of this decision remains uncertain.

The only final circuit decisions, issued after *Lindh*, that address the PLRA's applicability to post-enactment attorney fees is the Sixth Circuit case at issue and the Second Circuit's opinion in *Blissett v. Casey*, 147 F.3d 218 (2nd Cir. 1998). Both of these decisions properly apply *Lindh's* rulings to the attorney fee provisions of the PLRA in holding that the fee provisions do not apply retroactively to limit Plaintiffs' attorney fees in pending cases. There exists no conflict for the court to resolve where the only final circuit decisions, *Blissett* and *Hadix*, which analyzed the statute's provision pursuant to this Court's

rulings in *Lindh* are both consistent and correctly apply this Court's rulings.

There is also no conflict on the question of whether the Act's limitations apply retroactively to limit attorney fees for services performed prior to the effective date of the Act and "awarded" subsequent to the Act's passage.[16]

Courts have been nearly uniform in holding that Section 803(d) does not apply to "awards" of attorney fees for services performed prior to the passage of the Act, finding that the statutory language does not evince clear Congressional intent as to its temporal reach and application of the Act to pre-passage services would constitute an impermissible retroactive application. *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996); *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996); *Glover v. Johnson*, 138 F.3d 229, 249 (6th Cir. 1998).[17] In light of the uniformity in decisions

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[16] While Defendants' Petition states that they "do not dispute Respondents' counsel's entitlement to be paid for pre-PLRA work under pre-PLRA standards," elsewhere in their Petition Defendants argue that the attorney fee limitations of Section 803(d) of the PLRA should apply to any post-enactment award in any action brought by a prisoner regardless of when the work was completed. Petitioners' Brief, pp. 10-11, 21.

[17] In addition, nearly every district court which has considered the question has found the PLRA's attorney fee provision inapplicable to pre-passage work. *Blissett v. Casey*, 969 F. Supp. 118 (N.D.N.Y. 1997) (refusing to apply restrictions to attorneys fees earned after PLRA went into effect when case was pending on effective date); *Hadix v. Johnson*, 965 F. Supp. 996 (W.D. Mich. 1997) (same). There are also a number of unreported district court opinions refusing to apply the PLRA fees restrictions in cases that were pending when the Act became effective. *Tragale v. Scheel*, No. CV-N-93-672-DWH (D. Nev. May 21, 1997); *Browning v. Vernon*, No. Civ. 91-0409-5 BLW (D. Idaho March 7, 1997); *Coleman v. Wilson*, No. Civ. 5-90-0520 LKK JFM (E.D. Cal. Jan 21, 1997); *Perrier v. City of Albuquerque*, No. Civ. 95-943 RLP/WWD (D.N.M. Dec. 17, 1996); *Miller-Bey v. Stiller*, No. 93-CV-72111, 1997, U.S. Dist. LEXIS 8524 (E.D. Mich. Feb. 25, 1997).

and this Court's recent decision on statutory retroactivity, a grant of certiorari is not warranted in this case.

CONCLUSION

The Sixth Circuit Court of Appeals correctly held that the attorney fee provisions of the PLRA are inapplicable to these post-judgment cases which were pending prior to the effective date of the Act.

RELIEF SOUGHT

WHEREFORE, Plaintiffs-Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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October 16, 1998